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Supreme Court of the United States

OCTOBER TERM, 1959. No. 11

RAYMOND P. GALLAGHER, Chief of Police of the City of Springfield, Massachusetts, FOSTER FURCOLO, Governor of the Commonwealth of Massachusetts, and EDWARD J. McCORMACK, JR., Attorney General of the Commonwealth of Massachusetts,

Appellants,

vs.

CROWN KOSHER SUPER MARKET OF MASS., INC., IRVING HEAFITZ, MORRIS CHAITOVSKY, RUTH B. COHEN and RABBI MOSES D. SHEINKOPF,

Appellees.

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM THE JUDGMENT OR DISMISS THE APPEAL.

EDWARD J. McCORMACK, JR.,
Attorney General,
State House, Boston

JOSEPH H. ELCOCK, JR.,
Assistant Attorney General,
State House, Boston

JOHN WARREN McGARRY,
Assistant Attorney General,
State House, Boston

S. THOMAS MARTINELLI,
City Solicitor,
City Hall, Springfield

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Supreme Court of the United States

OCTOBER TERM, 1959. No. 532.

RAYMOND P. GALLAGHER, Chief of Police of the City of Springfield, Massachusetts, FOSTER FURCOLO, Governor of the Commonwealth of Massachusetts and EDWARD J. McCORMACK, JR., Attorney General of the Commonwealth of Massachusetts,

Appellants,

vs.

CROWN KOSHER SUPER MARKET OF MASS., INC., IRVING HEAFITZ, MORRIS CHAITOVSKY, RUTH B. COHEN and RABBI MOSES D. SHEINKOPF,

Appellees.

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM THE JUDGMENT OR DISMISS THE APPEAL.

I. On May 18, 1959, a three-judge court for the District of Massachusetts, through a majority of its members, delivered the "Opinion of the Court" on the question of the constitutionality of a state statute; McCarthy, District Judge, entered his dissenting opinion. On July 20, 1959, the court again through a majority rendered its

opinion denying appellant's motion for a new trial; McCarthy, J., filed a dissenting memorandum on July 23, 1959. None has been reported.

II. The jurisdiction of this court is invoked under the provisions of 28 U.S.C., § 1253 and § 2101 (b). The appeal is from a final decree of a three-judge court granting a permanent injunction against a public official prohibiting the enforcement of a state statute on the grounds that such statute is unconstitutional.

On June 12, 1959, the defendant's motion to dismiss was denied and a final decree was entered in the United States District Court for the District of Massachusetts, declaring Chapter 136 of the Massachusetts General Laws (Ter. Ed.), as amended, unconstitutional, void and unenforceable as applied to the plaintiffs, and enjoining and restraining the defendant Raymond P. Gallagher, Chief of Police of the City of Springfield, Massachusetts, from enforcing Section 5 of said Chapter 136 as against the plaintiffs.

A motion for new trial was filed in conformity with FRCP, Rule 59 (b) on June 22, 1959, and this motion was denied on July 20, 1959.

On September 18, 1959, the defendant caused to be entered in the United States District Court for the District of Massachusetts its notice of appeal to the Supreme Court of the United States in conformity with U.S.C. § 2101 (b) and under authority of *U.S. v. Ellicott*, 32 S. Ct. 334, 223 U.S. 524, 56 L. Ed. 535.

On October 2, 1959, appellees filed in the U.S. Supreme Court their cross-designation pursuant to Rule 12 of the Revised Rules of this Court.

On November 16, 1959, appellant filed its Jurisdictional Statement in the Supreme Court of the United

States pursuant to Rule 15 of the Revised Rules, and on December 11, 1959 appellees filed their Motion to Affirm the Judgment or Dismiss the Appeal in said Court pursuant to Rule 16.

III. The state statute in question is Massachusetts General Laws (Ter. Ed.) c. 136, §§ 5, 6. Section 5 reads as follows: "Whoever on the Lord's day keeps open his shop, warehouse or workhouse, or does any manner of labor, business or work, except works of necessity and charity, shall be punished by a fine of not more than fifty dollars." Section 6, which lists numerous exceptions to section 5, is set forth in full in Appendix "A".

IV. The following questions are presented by this appeal:

1. Does a Three Judge Court have jurisdiction to enjoin a municipal police official from enforcing a statute on the ground that such statute is unconstitutional?

2. Are the plaintiffs proper parties to raise the issues before the Court?

3. Should the Court have exercised its equitable jurisdiction?

4. Do the provisions of the Massachusetts General Laws, Chapter 136, violate the rights, privileges or immunities of the plaintiffs under the Constitution of the United States in interfering with their freedom of religion, by depriving them of their liberty or property without due process of law or by denying them the equal protection of the laws?

5. Has the Three Judge Court correctly applied the Massachusetts statute as interpreted by the Supreme Judicial Court of the Commonwealth?

6. Is the evidence submitted to the Court sufficient as a matter of law to sustain the findings and decree?

7. Is the decree entered by the Court consistent with the findings of fact?

V. The petitioner Crown Kosher Super Market of Mass., Inc. operates a super market in the city of Springfield, Mass., at which all types of meats and groceries were sold including all varieties of kosher foods. The officials owning and operating the market contended that their religious beliefs made it necessary for them to close the market at sun-down on Fridays and to remain closed through sun-down on Saturdays. The market was accordingly closed during these periods but was opened all day on Sundays in violation of Mass. General Laws c. 136, §§ 5 and 6, which makes it a criminal offense to keep open one's shop on Sunday. There are certain exceptions to this prohibition including an exception allowing a kosher meat market to open for the sale of kosher meat on Sunday between the hours of six o'clock and ten o'clock in the forenoon. In 1957 one Harold Chernock, the president and general manager of the corporate plaintiff, Crown Kosher Super Market of Mass., Inc., was convicted in the state courts for keeping open the market in violation of these statutory provisions, *Commonwealth* v. *Chernock*, 336 Mass. 384 (1957).

An equity proceeding in the State courts was also brought by the said Chernock to test the constitutionality of the statute in question but this suit was dismissed by the petitioner. Thereafter the corporate plaintiff together with the other named plaintiffs instituted the present proceeding asserting that the Massachusetts statutory provisions regulating the observance of Sunday is one respecting the establishment of religion, and deprives the plaintiff of their liberty and property arbitrarily, denies the free exercise thereof; and hence is

violative of the due process clause of the Fourteenth Amendment to the United States Constitution; and on the further ground that it denies the equal protection of the laws guaranteed by the Fourteenth Amendment.

The plaintiffs allege that they have no adequate remedy at law and that they will suffer irreparable injury in that the corporate plaintiff will suffer a loss in its gross business by being closed on Sunday, the plaintiff Rabbi will be unable to fulfill his religious duties, and the plaintiff customers will be unable to secure certain provisions prepared in accordance with their religion at times when they are able to purchase them.

Plaintiffs' motion for a preliminary injunction was not pressed; defendant filed a motion to dismiss which was consolidated with the hearing on the merits at the conclusion of which defendant's motion to dismiss was denied and the court, through a majority of its members rendered an opinion concluding that General Laws, c. 136, § 5, is in violation of all the constitutional safeguards enumerated by the plaintiffs in their Complaint, and entered its Final Decree declaring (1) said statute "unconstitutional, void and unenforceable as applied to the plaintiffs in this action, insofar as it requires the Crown Kosher Super Market to remain closed on Sunday after it has remained closed on the preceding Friday night and Saturday"; (2) enjoining and restraining "the defendant, his agents, servants, and employees, and all others acting in his behalf . . . from taking any action whatsoever, by instituting prosecutions or otherwise, to enforce Section 5 of said Chapter 136 of the Massachusetts General Laws (Ter. Ed.), as amended, against the plaintiffs in this action."

VI. ARGUMENT — IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM THE JUDGMENT OR DISMISS THE APPEAL.

A. In support of their Motion to Affirm the decision of the three-judge court, appellees state that ". . . the questions on which the decision of the cause depends are so insubstantial as not to need further argument . . ." (Motion p. 2). It is respectfully submitted that where a three-judge court enters a Final Decree (J. S. pp. 5-6) declaring a statute "unconstitutional, void and unenforceable . . ." and enjoins and restrains any manner of enforcement thereof, a substantial federal question is raised. It is to be noted that jurisdiction of this appeal from the decision of a three-judge court is conferred on the Supreme Court of the United States by 28 U.S.C. §§ 1253, 2101 (b), and has been sustained in *Radio Corp. of America* v. *United States*, 71 S. Ct. 806, 341 U.S. 412, 95 L.Ed. 1062 (J. S. p. 3). Cf. *Friedman* v. *N. Y.*, 341 U.S. 907 where the Court of Appeals of New York in 302 N. Y. 75, on facts similar to the case at bar *upheld* the state statute. On appeal to the U.S. Supreme Court from the Court of Appeals of New York appellee's motion to dismiss was granted and the appeal was dismissed for want of a substantial federal question. The reverse situation exists in the case at bar for a federal three-judge court has struck down a state statute.

Accordingly, appellant respectfully submits that the questions presented are so substantial within the meaning of the Rules of this Court as to require plenary consideration by this Court and requests that Appellee's Motion to Affirm be denied and that an order issue from this Court noting probable jurisdiction.

B. Appellees' Motion to Dismiss the Appeal is directed specifically (Motion pp. 2, 3, 10–12) to questions Nos. 6 and 7 of Appellant's Jurisdictional Statement. (J. S. p. 4). With respect to question No. 6 — Is the evidence submitted to the Court sufficient as a matter of law to sustain the findings and decree — appellant respectfully submits that it is in conformity with Rule 15 of the Revised Rules: that no "specification" (Motion p. 10) is required by the Rule which expressly states that ". . . it should not resemble in form or particularity the former assignments of error which are abolished . . . ." Nor are specifications a prerequisite for this Court to determine whether briefs and further arguments are necessary, for that is determined by the existence or absence of a substantial federal question, and it is submitted that even without question No. 6, a substantial federal question is raised by virtue of the fact that a three-judge court has struck down a state statute as unconstitutional. Furthermore, paragraph (f) of Rule 15 of the Revised Rules requires that the Jurisdictional Statement include ". . . *a statement of the reasons* why the questions presented are so substantial as to require plenary consideration with briefs on the merits and oral arguments, for their resolution." (emphasis added). It is respectfully submitted that this requirement has been complied with (J. S. pp. 6–7); and that not until the case is ripe for briefs and arguments on the merits is it necessary to specify and elaborate upon alleged errors of law.

With respect to question No. 7 — Is the decree entered by the Court consistent with the findings of fact — it is respectfully submitted that pages 5–6 of the Jurisdictional Statement does contain that portion of the Final Decree appealed from and that the appeal has been taken in conformity with the Rules of this Court.

Appellant feels that it would not be in keeping with the rule of conciseness at this time to elaborate upon which findings of fact they believe to be inconsistent with the decree. Similarly, appellant respectfully submits that a detailed discussion as to whether each question in and of itself raises a substantial federal question would more properly be reserved for briefs on the merits and oral arguments particularly since jurisdiction for an appeal from a three-judge court has been conferred by statute and sustained by this Court. (See A, above, and J. S. p. 3.)

Accordingly, appellant respectfully requests that appellees' motion to dismiss be denied.

VII. CONCLUSION.

In conclusion, therefore, the appellant respectfully requests that for the foregoing reasons appellees' motion to affirm the judgment be denied and their motion to dismiss also be denied.

Respectfully submitted,

EDWARD J. McCORMACK, JR.,
Attorney General,
for the Commonwealth of Massachusetts.

JOSEPH H. ELCOCK, JR.,
Assistant Attorney General,
for the Commonwealth of Massachusetts.

JOHN WARREN McGARRY,
Assistant Attorney General,
for the Commonwealth of Massachusetts
and member of the bar of the Supreme
Court of the United States.

S. THOMAS MARTINELLI,
City Solicitor,
Springfield, Massachusetts.

APPENDIX A.

Massachusetts General Laws, Chapter 136, section 6 as appearing in Mass. General Laws (Tercentenary Edition, 1932) and as amended as follows; second and third paragraphs as so appearing amended, 1934, 328 § 7; fourth paragraph amended, 1932, 96; 1934, 354; paragraph added at end, 1933, 150 § 3; section revised, 1934, 373 § 6; second paragraph amended, 1955, 304; revised, 1957, 556 § 16; third paragraph amended, 1936, 129; 1937, 286; 1950, 256 § 1; fourth paragraph amended, 1938, 143; same paragraph revised, 1943, 473; 1950, 681; 1951, 504; 1954, 217; 1957, 356 § 17; last paragraph revised, 1946, 207 § 4; paragraph added at end, 1949, 190; 1950, 322.

SECTION 6. The preceding section shall not prohibit the manufacture and distribution of steam, gas or electricity for illuminating purposes, heat or motive power; the distribution of water for fire or domestic purposes; the use of the telegraph or the telephone; the manufacture and distribution of oxygen, hydrogen, nitrogen, acetylene and carbon dioxide; the retail sale of drugs and medicines, or articles ordered by the prescription of a physician, or mechanical applicances used by physicians or surgeons.

Nor shall it prohibit the retail sale of tobacco in any of its forms by licensed innholders, common victuallers, druggists and newsdealers whose stores are open for the sale of newspapers every day in the week; the retail sale of bread, before ten o'clock in the forenoon and between the hours of four o'clock and half past six o'clock in the afternoon by licensed innholders and by licensed common

victuallers authorized to keep open their places of business on the Lord's day and by persons licensed under the following section to keep open their places of business as aforesaid; the retail sale of frozen desserts and or frozen dessert mix, soda water and confectionery by licensed innholders and druggists, and by such licensed common victuallers as are not also licensed to sell alcoholic beverages, as defined in section one of chapter one hundred and thirty-eight, and who are authorized to keep open their places of business on the Lord's day; the sale of frozen desserts and/or frozen dessert mix, soda water, confectionery or fruit by persons licensed under the following section or the keeping open of their places of business for the sale thereof; the sale of live bait for use by fishermen for non-commercial purposes.

Nor shall it prohibit work lawfully done by persons working under permits granted under section nine; the sale by licensed innholders and common victuallers of meals such as are usually served by them, consisting in no part of alcoholic beverages, as so defined, which meals are cooked on the premises but are not to be consumed thereon; the operation of motor vehicles; the sale of gasoline and oil for use, and the retail sale of accessories for immediate necessary use, in connection with the operation of motor vehicles, motor boats and aircraft; the making of such emergency repairs on disabled motor vehicles as may be necessary to permit such vehicles to be towed or to proceed under their own power, and the towing of disabled motor vehicles; the letting of horses and carriages or of boats, motor vehicles or bicycles; the letting on trains of equipment or accessories for personal use in connection with outdoor recreation and sports activities; unpaid work on pleasure boats; the running of

steam ferry boats on established routes; the running of street railway cars; the running of steamboat lines and railroad trains or of steamboats.

Nor shall it prohibit the preparation, printing and publication of newspapers, or the sale and delivery thereof; the wholesale or retail sale and delivery of milk, or the transportation thereof, or the delivery of frozen deserts or frozen desert mix, or both, or the wholesale or retail sale of ice or of fuel; the transportation of general commodities by motor truck or trailers, then engaged in interstate commerce before eight o'clock in the forenoon and after eight o'clock in the evening or in the event of an emergency between the aforesaid hours; the transportation of petroleum products by motor truck or trailers then engaged in intrastate commerce before six o'clock in the forenoon and after ten o'clock in the evening; the transportation of livestock, farm commodities and farm equipment for participation in fairs, exhibitions and sporting events and veterinary purposes; the handling, transportation and delivery of fish and perishable foodstuffs at wholesale; the sale at wholesale of dressed poultry, and the transportation of such poultry so sold, on the Lord's day next preceding Thanksgiving day, and on the Lord's day next preceding Christmas day except when Christmas day occurs on Saturday, the Lord's day or Monday; the making of butter and cheese; the keeping open of public bathhouses; the making or selling by bakers or their employees, before ten o'clock in the forenoon and between the hours of four o'clock and half-past six o'clock in the afternoon, of bread or other food usually dealt in by them; whenever Rosh Hashonah, or the Day of Atonement, begins on the Lord's day, the retail sale and delivery of fish, fruit and vegetables before twelve o'clock

noon of that day; the selling or delivering of Kosher meat by any person who, according to his religious belief, observes Saturday as the Lord's day by closing his place of business during the day until six o'clock in the afternoon, or the keeping open of his shop on the Lord's day for the sale of Kosher meat between the hours of six o'clock and ten o'clock in the forenoon.

Nor shall it prohibit the performing of secular business and labor on the Lord's day by any person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains from secular business and labor on that day, if he disturbs no other person thereby; the carrying on of the business of bootblack before eleven o'clock in the forenoon, unless prohibited in a city or town by ordinance or by-law; the digging of clams; the icing and dressing of fish; the cultivation of land, and the raising, harvesting, conserving and transporting of agricultural products during the existence of war between the United States and any other nation and until the first day of January following the termination thereof; such unpaid work in or about private gardens or private grounds, adjacent to a dwelling house, as shall not cause unreasonable noise, having regard to the locality where such work is performed.

Nor shall it prohibit the sale of catalogues of pictures and other works of art in exhibitions held by societies organized for the purpose of promoting education in the fine arts or the exposure of photographic plates and films for pleasure, if the pictures to be made therefrom are not intended to be sold and are not sold.

Nor shall it prohibit the conduct of any enterprise lawfully conducted under section four A or section four B.

Nor shall it prohibit the necessary preparation for and

the conducting of private industrial trade expositions which are not open to the general public; provided, that said expositions shall be kept open only between the hours of one and ten o'clock post meridian.

Nor shall it prohibit the sale of fruit and vegetables by the person who raised the same, or by his agent thereunto duly authorized, on premises owned or leased by him.

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No. 11

RAYMOND P. GALLAGHER ET AL.,
Appellants,

v.

CROWN KOSHER MARKET OF MASS., INC., ET AL.,
Appellees.

MOTION TO INTERVENE.

Now come George Michaels, of Newton, Massachusetts, Hugh Morton, of Fall River, Massachusetts, and John V. Phelan, of Needham, Massachusetts, all former assistant attorneys general for the Commonwealth of Massachusetts under the late Attorney General George Fingold, and move to intervene in the above-entitled action for the purpose of correcting the record by striking therefrom certain incorrect, unfair and prejudicial language contained in a memorandum dated November 12, 1959, filed in said case by United States District Court Judge William T. McCarthy dissenting from the majority finding by Federal Circuit Court Judges Calvert Magruder and Peter Woodbury. The language to be stricken appears on page 2 of said memorandum as follows:

> "I would be less than candid if I did not make the observation that insofar as the presentation of evidence on behalf of the defendant was concerned, the

case was not tried at all. One need only consult the record in the case and the docket entries on file to appreciate that this is so. The late Attorney General of the Commonwealth apparently contented himself with filing an appearance in its behalf. An Assistant Attorney General was assigned to the case but his activity was confined to the arguing of a motion to dismiss the complaint and to a cross-examination of the one witness who testified on behalf of the corporate plaintiff. In making that observation I make no reflection upon the able Assistant Attorney General who appeared in the court proceedings. Whatever the reasons may have been for the failure of the Commonwealth to investigate the allegations of the complaint, to present evidence on behalf of the defendant, and to uphold the constitutionality of the law of Massachusetts which had been repeatedly upheld by the State Supreme Court, the fact remains that the complete absence of credible evidence has left the record in this case inconclusive and confusing."

An examination of the history of this matter clearly indicates the responsibility for the preparation and handling of said case did not lie with the late Attorney General George Fingold, but this responsibility was unmistakably his successor's. M. Fingold's office first entered this case by the filing of a timely appearance on July 23, 1958; the late Attorney General's untimely death on August 31, 1958, caused the conduct of the case to be the sole responsibility of the present Attorney General, Edward J. McCormack, Jr., who has served continuously since September 10, 1958, two and one-half months prior to the trial of this matter on its merits.

The illness of Mr. Fingold in the late spring and summer of 1958 is common knowledge. In June of 1958 Mr.

Fingold was treated almost daily for heart disease, and, despite warnings of his physician, the late Attorney General insisted upon personally appearing before the Federal Court in New Haven in a matter vitally important to the citizens of the Commonwealth. As a result of severe and constant emotional and physical strain during this period, Mr. Fingold suffered a thrombus on the heart wall which became dislodged and caused a cerebral embolus on July 16, 1958. He never fully recovered from this episode and died on August 31, 1958, having suffered another heart attack on that date. The present Attorney General, Edward J. McCormack, Jr., took office on September 10, 1958.

In view of the fact that more than two months have passed since the District Court Judge William T. McCarthy filed his memorandum as indicated above, and in view of the fact that none of the parties to this matter has disputed the invalidity of the statements contained in said memorandum, counsel ask to be allowed to intervene for the purpose of correcting the record by striking therefrom said statements, which are inconsistent with the facts.

GEORGE MICHAELS,
75 State Street,
Boston 9,
Massachusetts.

HUGH MORTON,
21 Bedford Street,
Fall River,
Massachusetts.

JOHN V. PHELAN,
1492 Highland Avenue,
Needham 92,
Massachusetts.